

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

J. ADRIAN SONS, INC.

Case No. 95-11682 K

Debtor

MARK S. WALLACH, Trustee in
Bankruptcy of J. Adrian Sons, Inc.

Plaintiff

-vs-

AP 97-1170 K

COOK'S WHOLESALE FOODS, INC.

Defendant

Mark S. Wallach, Esq.
169 Delaware Avenue
Buffalo, New York 14202-2403

Trustee

Joseph S. Colbassani, Esq.
Minora, Minora, Colbassani, Ratchford and Krowiak
700 Vine Street at Jefferson Avenue
Scranton, PA 18510-2441

Attorney for Defendant

Findings of Fact, Conclusions of Law, and Decision After Trial

In this adversary proceeding, the Chapter 7 Trustee seeks to recover \$ 1752.30 as an avoidable preference under 11 U.S.C. § 547, and \$ 1530.00 as an unauthorized postpetition

transfer by the Debtor,¹ which was a debtor-in-possession under Chapter 11 from May 22, 1995 until the case was converted to Chapter 7 on February 27, 1997.

The Court granted partial summary judgment for the Trustee on the issues of whether the transfers were (1) preferential under § 547(b)(1)-(5); and (2) unauthorized postpetition transfers under § 549. The balance of the issues, which is to say the § 547(c) defenses, came on for trial on May 14, 1998.

At the close of the evidence, the Defendant's request for an opportunity to brief three issues was granted. Those issues are: (1) whether the Defendant successfully presented an "ordinary course of business" defense; (2) whether the Court erred in granting summary judgment for \$1,530.00 based on the 11 U.S.C. § 549; (3) whether the Trustee's preference action is barred by the statute of limitations, and/or statutory lookback period. The Defendant's brief and the Trustee's reply thereto have been considered. After due deliberation, the Court finds against the Defendant and for the Plaintiff/Trustee in all regards.

I. Issue #1

The Court rejects the Defendant's argument as to Issue #1 for the reasons set forth in the Trustee's Reply and also because what testimony that Mr. Morgan, the President of Cook's, did provide as to his other customers, was directly contrary to his case. He testified that

¹The Trustee's original complaint sought to avoid the entire transferred amount of \$3,282.30 as a preference. On motion of the Trustee the complaint was subsequently amended so that \$1752.30 was challenged as a preference and \$1530 as a postpetition transfer.

normal billing with his other customers was net 14 days, implied that they paid promptly, and stated that J. Adrian was an unusual customer that sometimes took two months to pay. This testimony directly disproves the third element of the “ordinary course” defense, *i.e.*, that the transfer was made “according to ordinary business terms,” or the objective industry standard. *See Lawson v. Ford Motor Co. (In re Roblin Indus.)*, 78 F.3d 30 (2d Cir. 1996).

If Mr. Morgan’s testimony was not offered as to the objective test, then in fact no evidence was offered as to the industry standards, and under *Roblin*, the defense must fail. The Court finds that the Trustee is entitled to a further judgment dismissing the affirmative defenses, as a matter of law.

Issue #2

The Court rejects the Defendant’s argument as to Issue #2 for the reasons set forth in the Trustee’s Reply.

Issue #3

The Court rejects the Defendant’s argument on Issue #3 for the reasons set forth in the Trustee’s Reply. If the Defendant’s argument regarding the 90-day lookback period for preferences is premised on the date which the check was made, then, of course, the Trustee is correct in relying on *Barnhill v. Johnson*, 503 U.S. 393 (1992).

With respect to the statute of limitations governing the Trustee's avoiding powers, the Trustee is also correct in arguing that Congress has amended § 546(a) to allow a trustee to bring an avoidance action either two years after entry of the order for relief, or one year from the date of appointment of the first trustee.

It is hereby ORDERED that a final judgment enter on both the February 25, 1998 Order of this Court granting partial summary judgment, and on this Order dismissing the affirmative defenses, on the merits. The judgment shall award \$3,282.30 plus interest and costs.

SO ORDERED.

Dated: Buffalo, New York
June 18, 1998

/s/ Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.